

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NUMA BARNES,	)	Case No. 13-3227 SC
	)	
Plaintiff,	)	ORDER GRANTING DEFENDANTS'
	)	<u>MOTIONS TO DISMISS</u>
v.	)	
	)	
HOMEWARD RESIDENTIAL, INC.;	)	
DEUTSCHE BANK NATIONAL TRUST	)	
COMPANY; MORTGAGE ELECTRONIC	)	
REGISTRATION SYSTEMS, INC.;	)	
POWER DEFAULT SERVICES, INC.;	)	
FIDELITY NATIONAL TITLE	)	
COMPANY; and DOES 1 through	)	
100, inclusive,	)	
	)	
Defendants.	)	

**I. INTRODUCTION**

This is a mortgage foreclosure dispute. Plaintiff Numa Barnes ("Plaintiff") brings this action against Defendants Homeward Residential, Inc. ("Homeward"); Deutsche Bank National Trust Company ("DBNTC"); Mortgage Electronic Registration Systems, Inc. ("MERS"); Power Default Services, Inc. ("PDS"); and Fidelity National Title Company ("Fidelity"). Now before the Court are two motions to dismiss, one brought by Homeward, DBNTC, MERS, and PDS (collectively, the "Homeward Defendants"), and the other brought by Fidelity. ECF Nos. 23 ("Homeward Defs.' MTD"), 31 ("Fidelity

MTD"). Plaintiff has opposed both motions. ECF Nos. 35 ("Opp'n to Homeward Defs.' MTD"), 38 ("Opp'n to Fidelity MTD"). The Homeward Defendants have filed a reply, but Fidelity has not. ECF No. 37 ("Reply ISO Homeward Defs.' MTD"). This matter is appropriate for determination without oral argument per Civil Local Rule 7-1(b). For the reasons set forth below, the motions are granted.

## II. BACKGROUND

In or around August 2006, Plaintiff obtained a \$1.3 million loan from American Brokers Conduit, secured by a deed of trust ("DOT") recorded against the real property located at 30 Vernal Court, Alamo, California (the "Property"). Compl. ¶ 13; Homeward Defs.' RJN Ex. A ("DOT").<sup>1</sup> The DOT identifies Fidelity as the trustee and MERS as the beneficiary. An assignment of the DOT was recorded, purportedly transferring the beneficial interest in the DOT to DBNTC. Compl. ¶ 15. Fidelity recorded a notice of default on November 9, 2011, and a notice of trustee sale on February 15,

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<sup>1</sup> Both the Homeward Defendants and Fidelity filed requests for judicial notice. ECF No. 24 ("Homeward Defs.' RJN"), 32 ("Fidelity RJN"). Plaintiff has filed identical objections to both. ECF Nos. 36, 39. The objections are **OVERRULED**, and the Court takes judicial notice of the DOT and the other publicly filed documents attached to the RJNs, but not the truth of the matters asserted by those documents. Pursuant to Federal Rule of Evidence 201, the Court may take judicial notice of "a fact that is not subject to reasonable dispute" because, among other things, it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Under this rule, the Court "may properly take notice of public facts and public documents." Cactus Corner, LLC v. U.S. Dept. of Agric., 346 F. Supp. 2d 1075, 1098 (E.D. Cal. 2004). Thus, the Court may also take judicial notice of legal documents filed in related litigation, including pleadings, motions, and judgments. In re Clorox Consumer Litig., 894 F. Supp. 2d 1224, 1230 (N.D. Cal. 2012). Additionally, Plaintiff references many of the documents attached to the RJNs in her complaint and, under the "incorporation by reference doctrine," a court may properly consider such documents. See Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005).

1 2012. Id. ¶¶ 16-17. Also on February 15, 2012, a substitution of  
2 trustee was recorded, purportedly substituting PDS as the trustee  
3 on the DOT. Id. ¶ 18. It is unclear from the pleadings whether a  
4 trustee sale has yet occurred, though Defendants represent that one  
5 has not.

6 On April 5, 2012, Plaintiff filed an action against Homeward  
7 in connection with the foreclosure proceedings against the Property  
8 in California Superior Court.<sup>2</sup> Homeward Defs.' RJN Ex. F.  
9 Plaintiff asserted causes of action for (1) breach of oral  
10 contract, (2) breach of written contract, (3) unfair business  
11 practices, and (4) declaratory relief. Id. Homeward filed a  
12 demurrer to the complaint. RJN Ex. G. The state court sustained  
13 the demurrer on December 11, 2012, but granted Plaintiff leave to  
14 amend. RJN Ex. H. Plaintiff did not file an amended pleading by  
15 the deadline set by the state court, and Homeward moved ex parte to  
16 dismiss the action with prejudice. Id. On February 15, 2013, the  
17 state court granted the ex parte motion and dismissed the action  
18 with prejudice as to Homeward. RJN Ex. I.

19 Though Fidelity is not named as a defendant in Plaintiff's  
20 state court complaint, judicially noticeable documents show that  
21 Fidelity also demurred to Plaintiff's state court action. Fidelity  
22 RJN Ex. H. The state court sustained the demurrer as unopposed,  
23 but granted Plaintiff leave to amend. Id. Plaintiff once again  
24 failed to file an amended pleading, and the state court dismissed  
25 Plaintiff's action as to Fidelity and entered judgment in favor of  
26 Fidelity on May 7, 2013. Fidelity RJN Ex. I.

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28 <sup>2</sup> Homeward was formerly known as American Home Mortgage Corp., and  
was sued under that name in state court.

On July 12, 2013, Plaintiff filed the instant action in federal court. Her Complaint asserts causes of action for (1) breach of express agreement; (2) breach of implied agreement; (3) slander of title, (4) wrongful foreclosure; (5) violation of California Civil Code § 2923.5; (6) violation of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601; (7) violation of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962; (8) violation of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, et seq.; and (9) violation of the California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, et seq. Like the state court action, the instant action challenges the foreclosure proceedings brought against the Property.

### III. LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a claim." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. 662, 664 (2009). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory

1 statements, do not suffice." Id. at 663. (citing Bell Atl. Corp.  
2 v. Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a  
3 complaint must be both "sufficiently detailed to give fair notice  
4 to the opposing party of the nature of the claim so that the party  
5 may effectively defend against it" and "sufficiently plausible"  
6 such that "it is not unfair to require the opposing party to be  
7 subjected to the expense of discovery." Starr v. Baca, 633 F.3d  
8 1191, 1204 (9th Cir. 2011).

9  
10 **IV. DISCUSSION**

11 Both the Homeward Defendants and Fidelity move to dismiss on  
12 the ground that Plaintiff's action is barred by res judicata. The  
13 elements of res judicata are: (1) an identity of claims, (2)  
14 identity or privity between parties, and (3) a final judgment on  
15 the merits. Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d  
16 708, 713 (9th Cir. 2001). The Court concludes that res judicata  
17 bars Plaintiff's claims.

18 To determine whether successive actions involve the same  
19 claims, courts consider, among other things, "whether the two suits  
20 arise out of the same transactional nucleus of facts." Harris v.  
21 Jacobs, 621 F.2d 341, 343 (9th Cir. 1980). "Newly articulated  
22 claims based on the same nucleus of facts may still be subject to a  
23 res judicata finding if the claims could have been brought in the  
24 earlier action." Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l  
25 Planning Agency, 322 F.3d 1064, 1078 (9th Cir. 2003). The instant  
26 action arises out of the same nucleus of facts as the state court  
27 action, because both action challenge the pending foreclosure sale  
28

1 of the Property and assert that the foreclosing entities breached  
2 the terms of the DOT.

3 Plaintiff cites to an Oregon case, Rennie v. Freeway  
4 Transport, 294 Or. 319 (1982), apparently for the proposition that  
5 Defendants "implicitly consented to the splitting of claim [sic]  
6 under state and federal laws." Opp'n to Homeward Defs.' MTD at 4-  
7 5. Setting aside that Oregon law does not control here and that  
8 Plaintiff asserts state law claims in the instant action,  
9 Plaintiff's argument is unavailing. Under Rennie, "[w]here the  
10 parties have agreed to the separate litigation of plaintiff's claim  
11 and the first judgment expressly withholds any decision as to the  
12 other aspects of the claim . . . a subsequent action by plaintiff  
13 based on those parts of the claim reserved is not precluded by res  
14 judicata." 294 Or. at 328. Here, there is no indication that any  
15 of the defendants agreed to separate litigation or that the state  
16 court reserved any aspects of Plaintiff's claims for later  
17 litigation. Soon after Plaintiff filed the instant action,  
18 Defendants moved to dismiss on res judicata grounds.

19 The second element of res judicata is satisfied as to Homeward  
20 and Fidelity because they were defendants in both actions. The  
21 remaining defendants, DBNTC, PDS, and MERS, are in privity with  
22 Homeward. Privity exists if "there is substantial identity between  
23 parties, that is, when there is sufficient commonality of  
24 interest." Tahoe-Sierra, 322 F.3d at 1081 (quotations omitted).  
25 Thus, Courts have found privity "where the interests of the  
26 nonparty and party are so closely aligned as to be virtually  
27 representative." Id. at 1082 (quotations omitted). The Court  
28 finds such commonality of interests exists here. Plaintiff is

1 suing defendants in connection with their attempt to foreclose on  
2 the Property. Homeward is the servicer of the mortgage on the  
3 Property, MERS and DBNTC are the former and current holders of the  
4 beneficial interest of the DOT securing the mortgage, and PDS is  
5 the substitute trustee on the DOT.

6 Plaintiff argues that her claims are not barred by res  
7 judicata because the state court did not render a final judgment on  
8 the merits. Plaintiff reasons that, while the state court  
9 sustained Homeward and Fidelity's demurrers, the court also granted  
10 Plaintiff leave to amend. However, Plaintiff neglects to point out  
11 that she failed to file an amended complaint as to either Homeward  
12 or Fidelity. As a result, both Homeward and Fidelity moved ex  
13 parte for judgment against Plaintiff. The state court granted both  
14 ex parte motions and dismissed Plaintiff's claims against Homeward  
15 with prejudice. Plaintiff did not appeal either judgment.

16 Under California law, "it is the rule that when a plaintiff is  
17 given the opportunity to amend his complaint and elects not to do  
18 so, strict construction of the complaint is required and it must be  
19 presumed that the plaintiff has stated as strong a case as he can."  
20 Gonzales v. State of California, 68 Cal. App. 3d 621, 635 (Cal. Ct.  
21 App. 1977). Thus, the Court presumes that Plaintiff could not cure  
22 the fatal defects in her state court complaint. Moreover, "for  
23 purposes of applying the doctrine of res judicata, . . . a  
24 dismissal with prejudice is the equivalent of a final judgment on  
25 the merits, barring the entire cause of action."<sup>3</sup> Boeken v. Philip  
26 Morris USA, Inc., 48 Cal. 4th 788, 793 (Cal. Ct. App. 2010).

27 <sup>3</sup> Though the state court did not indicate that Plaintiff's claims  
28 against Fidelity were dismissed with prejudice, the court did  
render judgment in favor of Fidelity. Moreover, the state court

1 Accordingly, the Court finds that res judicata bars Plaintiff  
2 from bringing the instant action because she brought similar claims  
3 against Homeward and Fidelity in state court. Plaintiff cannot now  
4 relitigate those claims against Homeward, Fidelity, or their  
5 privies, since Plaintiff's action against Homeward was dismissed  
6 with prejudice, and the state court entered judgment in favor of  
7 Fidelity after Plaintiff failed to amend her pleadings.

8  
9 **V. CONCLUSION**

10 For the foregoing reasons, Defendants Homeward Residential,  
11 Inc., Deutsche Bank National Trust Company, Mortgage Electronic  
12 Registration Systems, Inc., Power Default Services, Inc., and  
13 Fidelity National Title Company's motions to dismiss are GRANTED.  
14 Plaintiff Numa Barnes' action is DISMISSED WITH PREJUDICE.

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16 IT IS SO ORDERED.

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18 Dated: September 17, 2013

19   
UNITED STATES DISTRICT JUDGE

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28 entered a final judgment on the merits as to Homeward, Fidelity's  
privy, when it dismissed Plaintiff's claims against Homeward with  
prejudice.